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No. 08-243

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DEBRA L. THOMAS,

Petitioner,

v.

EVANSVILLE-VANDERBURGH SCHOOL CORPORATION, BOARD OF SCHOOL TRUSTEES OF THE EVANSVILLE-VANDERBURGH SCHOOL CORPORATION, PAT LOGE, SALLY KIVETT, JAMES TRADER, THOMAS HIGGS AND SHARON TURPIN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioner has presented compelling reasons to grant certiorari, where the Seventh Circuit's Opinion affirming the District Court's thorough analysis of Petitioner's evidence does not conflict with a decision of this Court or a Court of Appeals, and where Petitioner does not claim that the Seventh Circuit's ruling implicates an important federal question that has not been settled by this Court.

2. Whether Petitioner has presented compelling reasons to grant certiorari, where the Seventh Circuit's Opinion affirming the District Court's treatment of procedural issues in the trial court, including its rulings as to summary judgment, tendered supplemental evidence, oral argument, Petitioner's request for reconsideration, and scheduling matters, does not conflict with a decision of this Court or a Court of Appeals, and where Petitioner does not claim that the Seventh Circuit's ruling implicates an important federal question that has not been settled by this Court.

3. Whether Petitioner has presented compelling reasons to grant certiorari, where the Seventh Circuit's Opinion finding that Petitioner had no claim or right to control every aspect of her child's education at a public school, and no right under the facts presented to be informed of the academically oriented conversations between her daughter and school counselors, does not conflict with a decision of this Court or a Court of Appeals, and where Petitioner does not claim that the Seventh Circuit's ruling implicates an important federal question that has not been settled by this Court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Defendants disclose that Defendant Evansville-Vanderburgh School Corporation is a public school corporation, not a stock corporation. It has no parent and no publicly held company owns 10% or more of the corporation's stock.

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COUNTERSTATEMENT OF THE CASE

This case arises from the actions and alleged actions taken by individuals employed by Respondent Evansville-Vanderburgh School Corporation ("EVSC") with respect to Marteisha Mosley ("Marteisha"), who is Ms. Thomas's daughter. Ms. Thomas complains of the EVSC's actions in providing Marteisha the services of a counselor and a special needs counselor and in making reports to Child Protective Services ("CPS"). (3d Am. Complaint, Doc. No. 104). Ms. Thomas pleaded ten separate claims for relief, including state law theories of negligence (failure to obtain parental consent for counseling), negligent and intentional infliction of emotional distress, invasion of privacy, false light publicity, and defamation, as well as federal claims under 42 U.S.C. § 1983, including alleged violations of Ms. Thomas's Equal Protection, Due Process and First Amendment speech rights due to alleged retaliatory conduct, discriminatory conduct, discriminatory pattern and practice, and negligent supervision.

On November 4, 2004, the District Court granted summary judgment to Respondents as to Ms. Thomas's federal claims and dismissed Ms. Thomas's state law claims because, without the federal claims, the District Court lost jurisdiction of the state law claims. (Order on Defendants' Motion for Summary Judgment, Doc. No. 156, Appellee's Appx. Tab 1). As to the federal claims, the District Court specifically found that:

- Ms. Thomas's equal protection claims fail because she failed to present evidence

that the Defendants' conduct toward her had a discriminatory purpose or effect;

- Ms. Thomas's claims of deprivation of equal protection due to established custom or policy fail because she did not identify any such policy, pattern, or custom;

- Ms. Thomas's claims of deprivation of due process (inferred from her response to the motion for summary judgment, not her pleadings) fail because the Defendants are entitled to qualified immunity.

(*Id.*).

On April 23, 2007, the District Court entered a final judgment disposing of all claims against all parties (including the Counterclaim voluntarily dismissed by the Respondents) pursuant to Fed.R.Civ.P. 58. (See Record, Document Nos. 156, 190 and 191). Ms. Thomas filed the Notice of Appeal with the Seventh Circuit Court of Appeals on May 9, 2007. The appeal appeared to address not only the summary judgment ruling, but also the District Court's decisions on several procedural matters, such as its denial of Petitioner's request for oral argument, and its refusal to accept additional tendered documents offered in opposition to the motion for summary judgment.

The Seventh Circuit issued its Nonprecedential Disposition on December 26, 2007, affirming the

appealed judgment and orders of the District Court. On January 9, 2008, Petitioner filed her Petition for Rehearing and Petition for Rehearing En Banc, both of which were denied by the Court of Appeals on April 2, 2008. Petitioner submitted her original Petition for Writ of Certiorari in this cause on June 26, 2008, but it was not docketed until it was revised and resubmitted by Petitioner on August 26, 2008.

STATEMENT OF FACTS

Defendant Sally Kivett is a Special Concerns School Counselor, to whom EVSC personnel refer students based on academic difficulties the students display, as Ms. Kivett is responsible for problem solving, crisis management, conflict resolution, crisis counseling, attendance problems, self esteem, home visits and other and areas of guidance. (Kivett Ans. to Int., No. 1, Appellees' Appx. Tab 3; Kivett Affidavit, Appellees' Appx. Tab 3; Loge (Edwards) Ans. to Ints., No. 16, and attached "Special Concerns Counselor Duties and Responsibilities", Appellees' Appx. Tab 4; Trader Affidavit, Appellees' Appx. Tab 7).

By policy, Special Concerns School Counselors and all School Counselors in the EVSC maintain the confidentiality of their communications with students unless a report is necessary. (*Id.*; Kivett Ans. to Ints., No. 5, Appellees' Appx. Tab 3). The EVSC policy requires notification of parents in cases of suicidal ideations or potentially damaging statements, none of which were present in this case until February 2000, when Marteisha's behavior and actions were increasingly disturbing, at which point EVSC personnel

contacted Ms. Thomas. (Kivett Ans. to Ints., No. 5, Appellees' Appx. Tab 3).

It is EVSC policy and practice that school counselors do not need parental consent to call a student out of class, and here, the principal of Lodge Elementary School ("Lodge"), Pat (Loge) Edwards, authorized Ms. Kivett to see Marteisha based on numerous referrals from the nurse, teachers and the building counselor. (Kivett Ans. to Ints., No. 6, Appellees' Appx. Tab 3; Trader Ans. to Ints., Nos. 17, 18, Appellees' Appx. Tab 7).

On two occasions, Ms. Kivett discussed with Ms. Thomas problems with Marteisha's attitude and behavior in the school environment, and one of those occasions included Marteisha's biological father, as well. (Kivett Ans. to Ints., No. 7, Appellees' Appx. Tab 3). (Id.). The meetings concerned Marteisha's altercations with another student, and "escalating exotic behavior" displayed by Marteisha. EVSC personnel discussed with Ms. Thomas recommendations including involvement at church, contacting the family physician, and the YMCA "Diamonds" group, to help Marteisha with her self esteem issues. Ms. Thomas told the EVSC personnel at that time that she was "ready for someone else to take over Marteisha." (Kivett Ans. to Ints., No. 7, Appellees' Appx. Tab 3).

During the conference on February 29, 2000, Ms. Kivett related to Ms. Thomas certain statements Marteisha had made, specifically that Marteisha said Ms. Thomas had called her a "bitch," and threatened, "Do bad, and I'll hit you like a nigger in the street."

(Kivett Ans. to Ints., No. 17, Appellees' Appx. Tab 3). However, there was no report that Ms. Thomas had, in fact, done the things she was apparently threatening to do, so no child abuse report was made concerning those statements. (Kivett Ans. to Ints., No. 18, Appellees' Appx. Tab 3).

Ms. Kivett and Marteisha discussed various topics in the context of school counseling due to academic problems and referrals from teachers, the nurse and the counselor at Lodge. (Kivett Ans. to Ints., No. 23, Appellees' Appx. Tab 3; Kivett Affidavit, Appellees' Appx. Tab 3). The counseling sessions were academic in nature and intent. (Id.).

Defendant Tom Higgs was a School Counselor at Lodge, whose interaction with Marteisha was also limited to school counseling with the goal of helping Marteisha work through problems affecting her school work and causing her to be referred to him by teachers and administrators. (Higgs Ans. to Ints., No. 1, Appellees' Appx. Tab 5). (Higgs Affidavit, Appellees' Appx. Tab 5).

Several EVSC employees made reports of possible child abuse to Child Protective Services regarding Marteisha, including:

- Sharon Turpin, teacher, reported to the principal Marteisha's statement that Ms. Thomas told her not to open a can of soup, and that, when Ms. Thomas came home and found the soup can open, Ms. Thomas had Marteisha take all her

clothes off except her underwear and paddled Marteisha with a belt. (Loge (Edwards) Ans. to Ints., No. 14, Appellees' Appx. Tab 4; Turpin Ans. to Ints., No. 4, Appellees' Appx. Tab 6; Child Abuse and Neglect Reports, and CPS Investigation Reports, attached to Trader Ans. to Ints., Appellees' Appx. Tab 7);

- Debra Kasacavage, teacher, reported Marteisha's statement to her that Ms. Thomas had become angry with her over "bad grades," and had struck her with an extension cord. (Kasacavage Affidavit, Appellees' Appx. Tab 15; Reports, attached to Trader Ans. to Ints., Appellees' Appx. Tab 7);

- Marilyn Wright, school nurse, reported blueish-purple raised marks on Marteisha's right arm and Marteisha's statement that Ms. Thomas had whipped her with an extension cord, and that Ms. Thomas had promised not to do it again and told her not to tell anyone; on a separate occasion, Ms. Wright reported two reddish raised marks on Marteisha's right thigh, one approximately six inches long and the other approximately three inches long, and Marteisha's statements that Ms. Thomas was mad at her and had whipped her with an electrical cord the prior evening; on a third occasion,

Ms. Wright reported that Marteisha came to the nurse's office that morning to complain that her back was sore from where her mother had whipped her with a switch that morning, although Ms. Wright also reported that she had found no marks on Marteisha that time. (Wright Affidavit, Appellees' Appx. Tab 14; Child Abuse and Neglect Reports, and CPS Investigation Reports, attached to Trader Ans. to Ints., Appellees' Appx. Tab 7).

- Frances Seifert, substitute teacher, corroborated one of Ms. Wright's reports based on Ms. Seifert's own observations and statements made by the child. (Seifert Affidavit, Appellees' Appx. Tab 16; Child Abuse and Neglect Reports, and CPS Investigation Reports, attached to Trader Ans. to Ints., Appellees' Appx. Tab 7).

- Pat Loge (now Edwards), Principal, reported that Marteisha rode the city bus to the babysitter's house, as Ms. Edwards was concerned about the danger of a 10 year old child riding a city bus alone, rather than using school transportation or being picked up at school by a responsible adult. (Loge (Edwards) Ans. to Ints., No. 14, Appellees' Appx. Tab 4; Reports attached to Trader Ans. to Ints., Appellees' Appx.

> Tab); on a separate occasion, Ms. Edwards reported the "soup can" and paddling incident described by Ms. Turpin (see above) (Loge (Edwards) Ans. to Ints., No. 14, Appellees' Appx. Tab 4; Child Abuse and Neglect Reports, and CPS Investigation Reports, attached to Trader Ans. to Ints. , Appellees' Appx. Tab 7); on a third occasion, Ms. Edwards reported that Ms. Thomas had called Ms. Edwards at approximately 7:50 a.m. that morning, and had stated to Ms. Edwards that Ms. Thomas did not want Marteisha in the house, that Marteisha needs to go to "Hillcrest" (a local youth residential care facility) where Marteisha can "get sex," that Ms. Thomas did not want Marteisha anymore and wanted Marteisha out of her house, and was afraid she (Ms. Thomas) would "kill" Marteisha (Loge (Edwards) Ans. to Ints., No. 14, Appellees' Appx. Tab 4; Reports attached to Trader Ans. to Ints., Appellees' Appx. Tab 7).

Ms. Thomas alleged at one point in the lower court that the Evansville Police Department was called by someone at the EVSC regarding a complaint against Ms. Thomas, but the EPD was never called. (Trader Ans. to Ints., No. 10, Appellees' Appx. Tab 7).

EVSC policy and procedure requires school personnel to make a report each time they "suspect or know of an incident of sexual abuse, child abuse or child

neglect," but does not provide for the school personnel to investigate the incident; rather, the incident is reported to CPS, whose case workers make the investigations. (Kivett Ans. to Ints., No. 4, and attached Procedures, Appellees' Appx. Tab 3; Trader Ans. to Ints., No. 4, Appellees' Appx. Tab 7).

Once CPS makes its investigation, a report is labeled "abuse substantiated" or "abuse unsubstantiated." On at least two occasions, reports of abuse made against Ms. Thomas regarding Marteisha were "substantiated," namely the reports of March 25, 1998 and December 8, 1998. (Affidavit of Shirley Starks, Appellees' Appx. Tab 17; Reports attached to Trader Ans. to Ints., Appellees' Appx. Tab 7). Where CPS determines the child abuse report to be "unsubstantiated," all records of it are expunged from CPS pursuant to office policy and Indiana law. (Affidavit of Shirley Starks, Appellees' Appx. Tab 17). As such, CPS has no record of the investigation of the other child abuse reports. (*Id.*).

Even though many of the child abuse reports were apparently deemed "unsubstantiated," none were considered intentional false reports. (Affidavit of Shirley Starks, Appellees' Appx. Tab 17).

No student is situated similarly to Marteisha and no parent is situated similarly to Ms. Thomas. No one similarly situated to either would be treated any differently by the EVSC regardless of race. Any negative reaction Ms. Thomas has perceived from the EVSC has been to her attitude and approach in dealing with the issues involved in this case, including her statements to staff that she wished Mr. Trader would have a heart

attack and die, and her statements to Principal Pat (Loge) Edwards that she wished Ms. Edwards' breast cancer had killed her. The manner in which EVSC personnel have dealt with Ms. Thomas has nothing to do with her race, but rather with the specific facts and circumstances. (Trader Affidavit, Appellees' Appx. Tab 9; (Loge) Edwards Affidavit, Appellees' Appx. Tab 10).

Ms. Thomas withdrew her other children who had been enrolled at Lodge for the 2002-2003 school year because she did not wish them to be there in light of the current controversy; therefore, they were placed at Culver School. (EVSC Ans. to Ints., No. 9, Appellees' Appx. Tab 8). Shortly before the 2003-2004 school year began, Ms. Thomas asked that the children be placed back at Lodge. The EVSC rejected the request, not in retaliation for the current litigation, but rather for the same reason Ms. Thomas herself had withdrawn the children from Lodge originally: to avoid confrontation with Lodge personnel, including individual Respondents in this lawsuit, and to defuse the situation as much as possible. (*Id.*; Trader Affidavit, Appellees' Appx. Tab 9; (Loge) Edwards Affidavit, Appellees' Appx. Tab 10).

REASONS FOR DENYING THE PETITION

I. Petitioner has Presented No Evidence or Argument Bearing on the Considerations Governing Review.

Ms. Thomas has not presented any compelling reasons (or any reasons at all) to grant certiorari. The Seventh Circuit's Opinion affirming the District Court's thorough analysis of Petitioner's evidence, and affirming the District Court's treatment of both substantive and procedural issues does not conflict with a decision of this Court or a Court of Appeals, and Petitioner does not claim that the Seventh Circuit's ruling implicates an important federal question that has not been settled by this Court. S.C.Rule 10. Most importantly, Rule 10 provides that and certiorari will not generally be granted where "the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S.C.Rule 10.

Regarding the review of procedural issues, Ms. Thomas identifies the District Court's refusal to accept her tendered supplemental evidence, its denial of her request for oral argument, and other matters involving scheduling conferences and requests for reconsideration. These are repeatedly mentioned in the Petition under "Questions for Review" but no evidence or authority is given as to why the court was wrong, let alone why this Court should review those decisions.

Regardless of Ms. Thomas's focus on procedural matters in her "Questions for Review," the bulk of the

Petition seems to address the substantive merits of her case and the Seventh Circuit's affirmation of summary judgment for the Respondents, in spite of her voluminous appellate appendix, which she alleges was evidently ignored by the Seventh Circuit. Although this Court sometimes reviews a grant of summary judgment de novo, this Court is in no better position than the District Court and the Court of Appeals to evaluate evidence at issue in this case. *See United States v. Winstar Corp.*, 518 U.S. 839, 860-861 (1996). It would be a waste of limited judicial resources, not to mention the resources of Respondents, to accept this case for review and thus repeat the process already undertaken (twice) by the courts below. The Petition is simply Ms. Thomas's attempt to have another chance to prove claims that have failed thus far, simply by switching to a different forum. However, those claims are nonetheless addressed below.

II. Federal Claims

To establish a valid claim under 42 U.S.C. § 1983, a claimant must show: (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 68 L.E.2d 420 (1981).

A. Defendants are Entitled to Qualified Immunity from Liability.

"Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982). If the law was not "clearly established," no liability should result because "an official could not reasonably be expected to anticipate subsequent legal developments, nor could be said to 'know' that the law forbade conduct not previously identified as unlawful." *Id.*

The question here is whether the law "clearly establishes" the basis for Ms. Thomas's claim, and whether that law was clearly established at the times of the actions in question, i.e., whether a reasonable state actor would have known that his actions, viewed in the light of the law at the time, were unlawful. *McDonald v. Haskins*, 966 F.2d 292, 294 (7th Cir. 1992).

The EVSC personnel followed the mandates of Indiana law requiring school employees to report, but not investigate, every possibility of abuse or neglect upon "reasonable suspicion," even if it is ultimately shown that no abuse or neglect occurred. I.C. § 31-33-5-1 *et seq.* EVSC employees confronted with any evidence of child abuse or neglect may be subject to criminal and civil liability if they do not make a report. *Id.*

Those who make the reports, cause them to be made, or otherwise participate in proceedings or investigations involving child abuse and neglect, are immune from liability, even when a report turns out to be unsubstantiated. I.C. § 31-33-6-1.

The EVSC personnel had no reason to believe their actions were unlawful, and their actions were not unlawful. No evidence suggests they knew the reports were false, and on at least some of the occasions, CPS substantiated the allegations. (See Investigation Reports, Form FFP311, attached to Trader Ans. to Ints., Appellees'Appx. Tab 7).

Moreover, EVSC personnel counseled Ms. Thomas's daughter appropriately and without Ms. Thomas's knowledge or consent because there was no legal requirement, known to them or not, for prior knowledge and consent under those circumstances.

As the Seventh Circuit below stated in its Order:

> [A] right to choose the type of school one's child attends, or to direct the private instruction of one's child, does not imply a parent's right to control every aspect of her child's education at a public school. *See Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1204-07 (9th Cir. 2005); *Leebaert v. Harrington*, 332 F.3d 134, 140-42 (2d Cir. 2003); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 533-34 (1st Cir. 1995); cf. *Wisconsin v. Yoder*, 406 U.S. 205, 232-33 (1972) (limiting state's power over education when it implicates parent's rights

> under the Free Exercise Clause). Kivett's affidavit testimony shows that her discussions with Marteisha were academic in nature, focusing only on her problems performing and functioning at school. And Marteisha's vague description of the conversations as "personal" in her affidavit, signed at age 16, does not rebut that testimony. Because Thomas pointed the court to no authority to support her claimed right to know about these academically oriented conversations when they occurred, the district court correctly concluded that the school officials were entitled to qualified immunity.

(Slip Op. at 4). Also persuasive is the analysis in *Roman v. Appleby*, 558 F.Supp. 449 (E.D. Pa. 1983), involving facts strikingly similar to those in this case. The *Roman* court discussed the relationship between the family and the government, particularly in the school setting as *parens patriae*, in raising children and providing for their well-being; it concluded that the school counselor there had no reason to believe her actions were illegal or unconstitutional, particularly in light of her legal obligation to report any reasonable basis for suspecting child abuse or neglect, and that the constitutional right of parents to raise their children does not mean that schools are constitutionally restricted from providing counseling, even on sensitive topics that the parents would rather address themselves. *Id.* at 455-461.

Finally, Ms. Thomas's claims are inconsistent with Indiana law specifically providing that the relationship and interactions between student and counselor are

confidential, that communications between school counselors are privileged from disclosure, and that school counselors are immune from disclosing privileged or confidential communications made by a student. I.C. 20-6.1-6-15. Indiana law does not provides that the counseling itself, or this immunity and confidentiality, requires a parent's prior approval, consent or knowledge. To the contrary, such an obligation would be inconsistent with concepts of confidentiality and immunity, particularly since many such communications, as in this case, pertain to and even implicate the parent; therefore, requiring consent would have a chilling effect upon the confidential relationship between students and school counselors, and would discourage students from disclosing important matters including allegations of child abuse and neglect.

B. Ms. Thomas Cannot Support Any Claims Against the EVSC Itself.

Ms. Thomas's claims that the EVSC itself is liable for the creation of "policies and customs" that allegedly led to deprivation of Ms. Thomas's constitutional rights (3d Am. Complaint, ¶¶ 76-77) fail because they do not implicate fundamental rights and because Ms. Thomas cannot satisfy the elements of liability for policymaking.

1. Fundamental Rights

When the focus of a substantive due process case is on legislation or rule-making (including policymaking), as opposed to a specific act of a governmental official, the court must decide whether the legislation interferes with "certain fundamental rights and liberty interests."

Foo v. Indiana University, 88 F.Supp.2d 937, 961 (S.D. Ind. 1999), *citing Dunn v. Fairfield Community High School District No. 225*, 158 F.3d 962, 966 (7th Cir. 1998), *quoting Washington v. Glucksberg*, 117 S.Ct. 2258, 2267 (1997).

This Court in *Glucksberg* set out two features of this analysis:

> First, . . . the due process especially protects those fundamental rights and liberties which are, objectively, deeply rooted in this nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. Second, we have required in substantive-due-process cases a careful description of the asserted fundamental liberty interest. Our Nation's history, legal traditions and practices thus provide the crucial guideposts for responsible decision making that direct and restrain our exposition of the due process clause.

Foo, 88F.Supp.2d at 961, *quoting Glucksberg*. Accordingly, a court must "carefully formulate the interest that [plaintiffs] want constitutionally protected." *Foo*, 88 F.Supp.2d at 961, *citing Khan v. Gallitano*, 180 F.3d 829 (7th Cir. 1999) (*quoting Glucksberg*, 117 S.Ct. at 2269).

This Court has long held that a student's interest in education is not a fundamental right. *Foo*, 88 F.Supp.2d at 961, *citing San Antonio Independent*

School District v. Rodriguez, 411 U.S. 1 (1973). However, in *Rodriquez*, this Court also acknowledged its prior recognition in *Brown v. Board of Education*, that "education is perhaps the most important function of state and local governments." *Rodriguez*, 411 U.S. at 29 *quoting Brown v. Board of Education*, 347 U.S. 43 (1954). The Court reaffirmed its historic dedication to public education but noted that "[t]he importance of a service performed by the state does not determine whether it must be regarded as fundamental . . . ." *Rodriguez*, 411 U.S. at 31.

> It is not the province of this Court to create substantive constitutional rights . . . . Thus, the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative social significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.

Id. at 33. The *Rodriguez* Court held that "education . . . is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected." *Id.* at 35. Ms. Thomas's assertion that the alleged deprivation of some aspect of her daughter's alleged fundamental educational right protected by the 14th Amendment is thus contrary to Supreme Court precedent.

Finally, Ms. Thomas does not allege that the state law remedy is inadequate or that EVSC has prevented Ms. Thomas from relief under state law. In fact, her pleadings allege claims for relief under Indiana law, thereby admitting that an adequate remedy exists under state law. Under the *Glucksberg* fundamental-rights analysis, Ms. Thomas's substantive due process claim fails as a matter of law. *See Wudtke v. Davel*, 128 f.3D 1057, 1062 (7th Cir. 1997).

2. Policy or "Constitutional" Claims

Ms. Thomas claims she was deprived of equal protection rights as a direct result of "persistent policies or customs which were racially hostile and which were the moving force" of such violations, that the EVSC and its board were "deliberately indifferent with respect to the establishment of policies or customs" concerning protected rights, and that they "conducted inadequate training" (of whom, she does not say) with respect to those protected rights. (3d Am. Complaint, ¶ 75, 76, 77).

Ms. Thomas also claims that the EVSC and its Board "retaliated" against her for exercising her first amendment rights to freedom of speech, because she expressed her concerns "with respect to the unconsented to counseling sessions, the obtaining private information from plaintiffs daughter, and the general manipulation of plaintiffs daughter" to school officials. She claims this retaliation came in the form of "forcing her children to attend a school outside their home district during the 2003-2004 school year" and "manufacturing false child abuse reports against plaintiff." She also claims she was retaliated against

because she "exercis[ed] her due process rights to file a complaint concerning defendants' actions in a court of law." (Complaint, Count X).

Ms. Thomas's § 1983 claims against the EVSC or its Board fail because she does not establish (1) an express policy in the school system that when enforced caused a constitutional deprivation; or (2) a practice or custom by the school system of such unconstitutional conduct; or (3) a constitutional injury caused by a person with final policy making authority. *Oliver v. McClung*, 919 F.Supp 1206, 1212 (N.D. Ind. 1995); *Monell v. Department of Social Services*, 436 U.S. 658 (1978). Ms. Thomas does not identify any express policy causing constitutional deprivation, so this brief addresses only the second and third elements.

3. Free Speech – Retaliation

Ms. Thomas claims EVSC impaired her right to free speech by denying her children placement at Lodge Elementary School, which is only a few blocks from her home, and instead placing them at Culver Elementary School, which is farther away, all in retaliation against her for complaining about the events at issue in this case. (3d Am. Complaint, Count X). Ms. Thomas claims the alleged "manufacturing of false child abuse reports" by EVSC employees was likewise retaliatory. (*Id.*).

Ms. Thomas's children were placed at Culver because Ms. Thomas had withdrawn them from Lodge for the 2002-2003 school year on the basis that she did not wish them to be there in light of the current controversy. Nonetheless, shortly before the 2003-2004

school year began, Ms. Thomas asked that the children be placed back at Lodge. The EVSC denied this request, not in retaliation for the current litigation, but rather for the same reason Ms. Thomas herself had withdrawn the children from Lodge originally – to avoid confrontation with Lodge personnel, including individual Respondents, and to defuse the situation as much as possible. (EVSC Ans. to Ints. No. 9, Appellees' Appx. Tab 8; Trader Affidavit, Appellees' Appx. Tab 9; Edwards Affidavit, Appellees' Appx. Tab 10).

The child abuse reports were neither "manufactured" nor "false." Moreover, there are no facts to support Ms. Thomas's allegation that the EVSC itself, or its Board, had anything to do with the reports.

Ms. Thomas's claims also do not meet the standards set under first amendment's "petition clause" deprivation cases, because the speech at issue does not touch upon matters of public, rather than private, concern. *Griffin v. Thomas*, 929 F.2d 1210 (7th Cir. 1991), *citing Connick v. Myers*, 461 U.S. 138 (1983). Ms. Thomas's speech simply complained about the way particular EVSC employees treated her and her daughter as individuals, which is a matter of only private concern to Ms. Thomas herself.

C. Ms. Thomas Was Not Deprived of Equal Protection Rights.

The Petition fails to show any of the requisite proof that any Respondent "acted with a nefarious discriminatory purpose . . . and discriminated against [the claimant] based on his membership in a definable

class." *Nabozny v. Podlesny*, 92 F.3d 446, 453 (7th Cir. 1996), *citing Personnel Adm'r of Massachusetts v. Feeney*,442 U.S. 256, 279, 60 L. Ed. 2d 870, 99 S. Ct. 2282 (1979), *Albright v. Oliver*, 975 F.2d 343, 348 (7th Cir. 1992), *aff'd*, 510 U.S. 266, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994); *Falls v. Town of Dyer*, 875 F.2d 146, 148 (7th Cir. 1989).

As the Seventh Circuit has explained:

> The gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons aggrieved by the state's action. A plaintiff must demonstrate intentional or purposeful discrimination to show an equal protection violation. Discriminatory purpose, however, implies more than intent as volition or intent as awareness of consequences. It implies that a decisionmaker singled out a particular group for disparate treatment and selected his course of action at least in part for the purpose of causing its adverse effects on the identifiable group.

Shango v. Jurich, 681 F.2d 1091, 1104 (7th Cir. 1982) (citations and internal quotations omitted). Accordingly, a showing that the defendants were negligent is insufficient; rather, the claimant must show that the defendants acted intentionally or with deliberate indifference. *Nabozny, supra* at 454, *citing Archie v. City of Racine*, 847 F.2d 1211, 1219 (7th Cir. 1988), *cert. denied*, 489 U.S. 1065, 103 L. Ed. 2d 809, 109 S. Ct. 1338

(1989); *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049, 79 L. Ed. 2d 720, 104 S. Ct. 1325 (1984); *Shango*, 681 F.2d at 1104.

Ms. Thomas states repeatedly in her Petition that the actions of the individual Respondents, under color of state law, violated her equal protection rights, stating that similarly situated individuals of other races are treated differently by the Respondents, but provides no evidence of different treatment based on race.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

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